Rood Trucking Company, Inc. *and* American Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, AFL–CIO. Case 3–CA–23514

August 31, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On October 1, 2002, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge dismissed complaint allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating employees Larry Marangoni and Thomas Kelly because of their union and protected concerted activities. He found that the credited evidence failed to demonstrate that the Respondent harbored antiunion animus and that the General Counsel did not carry his initial burden of showing an unlawful motive. He further reasoned that even if animus was shown to have been a substantial or motivating factor in Marangoni's and Kelly's discharges, the Respondent carried its burden of showing that the two employees would have been discharged even in the absence of protected conduct.

Contrary to the judge, our examination of the record convinces us that the Respondent harbored animus and that its asserted reason for discharging Marangoni and Kelly was a pretext designed to conceal an unlawful motive. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by terminating the two employees.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F. 2d (3d[d] Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

I. FACTUAL BACKGROUND

The Respondent hauls mail under contract for the United States Postal Service, employing approximately 140 truckdrivers in Ohio, Pennsylvania, and New York. George Rood is president, his wife, Diane Rood, administers the pension fund, Pat Packo is the director of operations, and Mary Balazs is the Respondent's legal counsel.

Drivers Marangoni and Kelly were hired in 1995. For 4–5 years beginning in 1997, they both drove the "809-808" route from Rochester, New York, to the Pittsburgh, Pennsylvania Bulk Mail Center (BMC) and back, but working on alternate days.

A. Union and Protected Concerted Activities of Marangoni and Kelly

The Union[2] conducted an unsuccessful organizing campaign among the Respondent's employees in 1999. It continued its efforts and won a representation election in December 2000, and was certified as the drivers' representative in February 2001.

While both Marangoni and Kelly supported the Union's second campaign, Marangoni was more open and active, and served on the organizing committee. Following the Union's certification, Marangoni became steward and participated in initial contract negotiations. Staff Representative Mark Dimondstein served as the Union's lead negotiator. Director of Operations Packo and Counsel Balazs represented the Respondent in negotiations.

In early 2001, Marangoni discovered that employer contributions toward his pension were several months in arrears and he telephoned Fund Administrator Diane Rood seeking information about the deficiencies. After 3 weeks passed without receiving a response, Marangoni phoned Diane Rood again, told her that he had spoken to other drivers about the failure to receive timely pension contributions, and that the matter would be further pursued. Rood hung up on him. Marangoni brought the issue to Dimondstein's attention and in turn it was referred to the Department of Labor (DOL) for investigation.[3]

Prior to a negotiation session on February 12, 2002, Dimondstein met with Balazs away from the bargaining table to discuss the possibility of resolving the outstanding pension issue separately from contract negotiations. In that conversation, Dimondstein reminded Balazs that the pension problem arose prior to the Un-

[2] American Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, AFL–CIO.

[3] At the time the pension matter arose, the Department of Labor was already investigating the Respondent's practices regarding compensating drivers for breaktime. Marangoni had spoken to a DOL investigator concerning that issue in a vehicle on company property in 1999.

ion's certification and that the Union was not directly involved. Balazs responded that the Union was involved and that it was "your guy" Marangoni who was responsible for the DOL investigation.

Later that day at the bargaining table, Marangoni referred to the ongoing DOL inquiry and accused George Rood of stealing drivers' pension money. Dimondstein told Balazs that he could not believe that the Respondent was putting its postal contracts in jeopardy by not settling the pension contribution issue. Gesturing toward Marangoni, Balazs replied that only the Union's frivolous lawsuits "like the one filed by Larry [Marangoni]" were putting the postal contracts at risk. Dimondstein countered, pointing out that it was the *drivers* and not the Union, who had filed the DOL charges. Balazs retorted, "No, it's the Union."

B. The Route Schedule Change

From December 1999 until July 2001, the 809-808 route schedule provided for 11 hours and 20 minutes of paid time. On July 30, 2001, in response to the Postal Service's decision to advance the scheduled arrival time at the Pittsburgh BMC by 15 minutes to 8:45 p.m., the Respondent conformed its schedule to this change, and made other changes, which reduced drivers' paid time to 11 hours. These other changes included decreasing the outbound off-duty meal-breaktime from 65 to 50 minutes and changing the allocation of layover time at the Pittsburgh BMC from 1 hour of paid time to 40 minutes of paid time (for fueling and pretrip duty time) and 35 minutes of off-duty meal-breaktime, thus eliminating the 35 minute meal break en route to Rochester. Both before and after the schedule changes, 15 minutes was allowed at the start and finish of the route for pre and posttrip responsibilities.

Marangoni and Kelly both experienced problems with the new schedule. In addition to preexisting claims that the designated reporting time 15 minutes prior to departure was too short to complete all the pretrip responsibilities, and that the departure time brought them into Buffalo during heavy traffic, they also claimed that the assigned fueling time necessitated backtracking, thereby consuming extra time that would both cut into their unpaid/off-duty time and would cause them to leave the BMC for Rochester after the scheduled departure time.

About a week after the schedule change, Marangoni told Director of Operations Packo that he was having problems with the revised schedule. Packo advised him to continue running the route and to submit an exception report[4] if he could not complete the route within the allotted time. Kelly also informed Packo that he was unable to complete the route timely if he took the designated 50-minute break. Packo told Kelly to file an exception report to claim the additional time he needed. Following Packo's direction, Marangoni and Kelly thereafter submitted exception reports claiming additional time along with their biweekly timesheets and Department of Transportation (DOT) logs. In subsequent conversations with Packo, they each reiterated their concerns about the new schedule and Packo again instructed them to file exception reports if they could not complete the route within the allotted time. Thus, along with their other paperwork, Marangoni filed exception reports claiming 30 minutes beyond the 11 scheduled hours and Kelly submitted exception reports for 20 extra minutes. Neither Packo nor anyone from management ever questioned either driver about their exception reports. It is undisputed that Packo invariably approved their claims and paid them for the extra time.

Packo testified that within a short time he noticed a pattern in the exception reports and became concerned that Marangoni and Kelly were using them to recoup the 20 minutes of paid time they had lost under the revised schedule. He further testified that the press of business prevented him from following up on his concern until after the Christmas holiday season, and therefore, it was not until late in January 2002, after consulting with Counsel Balazs, that Packo hired a private investigating company to conduct surveillance on Marangoni's route.[5]

C. The Surveillance and the Discharges

On January 29–30, 2002, investigators followed Marangoni on his route from Rochester to the Pittsburgh BMC and back. On January 31, they provided Packo with videotape and a three-page report of their observations from 2:28 p.m. on January 29, when Marangoni's tractor-trailer was seen leaving the Rochester facility, until its arrival back in the area of the Rochester facility at 1:56 a.m. on January 30. The investigators did not, however, record Marangoni's pretrip duties or the time that Marangoni remained on duty after he entered the Rochester facility.

Following the contract negotiations on February 12—described earlier—Marangoni gave Packo his completed timecards, DOT logs, and an exception report, claiming

[4] An exception report is a form attached to drivers' timecards on which they can request additional paid time by identifying the reason why a trip took longer to complete than the route schedule provided.

[5] Packo testified that because of Marangoni's uion role, Balazs counseled caution about conducting the investigation themselves. Packo stated that in order to get an unbiased opinion, he hired an independent company to perform surveillance of Marangoni's route.

an additional 30 minutes for each 809-808 trip made during the prior 2 weeks, i.e., 11 hours and 30 minutes per trip, including the one made on January 29–30. After comparing Marangoni's reported time with the observations detailed in the surveillance report, Packo assertedly concluded that Marangoni's claims for January 29–30 were false and that he consistently had been improperly claiming the extra time. Even though no surveillance was conducted on Kelly, Packo also assertedly inferred that if Marangoni was able to make the trip within the scheduled time, Kelly could do so as well, and thus concluded that Kelly was also guilty of making false time claims. The next day, after consulting with George Rood and Balazs—but without further investigation or inquiry—Packo telephoned both Marangoni and Kelly at their homes and told them that they were terminated immediately for falsifying timecards, DOT logs, and stealing time and money from the Respondent.

II. THE JUDGE'S DECISION

In assessing whether Marangoni and Kelly were unlawfully terminated, the judge applied the Board's long-established *Wright Line* analysis.[6] *Wright Line* set forth a causation test to be used in cases alleging violations of the Act that turn on employer motivation. The test requires the General Counsel to show that protected conduct was a motivating factor in the employer's decision. To make this showing, the General Counsel must prove the existence of protected activity, employer knowledge of that activity, and employer animus toward that activity. Once the General Counsel has met these elements, the burden shifts to the employer to demonstrate that the same adverse action would have taken place even in the absence of protected conduct.

The judge found that the Respondent knew that Marangoni had engaged in both union and protected concerted activities,[7] but he found no evidence of animus. Thus, the judge observed that no other driver who cooperated with the DOL investigation or who participated in contract negotiations was disciplined. And he rejected the General Counsel's contention that statements attributed to Packo and Balazs at the February 12 negotiating sessions revealed animus, based partly on his crediting of Packo's denials as to some statements, and observing generally as to the remainder that "the negotiation process often engenders heated exchanges between participants."

Alternatively, the judge reasoned that, even assuming that animus motivated the termination, the Respondent carried its burden of establishing that it would have discharged Marangoni irrespective of his union and/or protected concerted activities. He found that the routine submission of exception reports by Marangoni and Kelly over a several month period raised Packo's suspicions sufficiently to justify the investigation; that the Respondent cautiously engaged a neutral party to conduct route surveillance; that the ensuing surveillance report "conclusively established" that Marangoni completed the route in 10 hours and 20 minutes, but claimed 11 hours and 30 minutes; and that discrepancies between that report and the documents Marangoni submitted revealed that Marangoni had routinely filed false time claims for reimbursement, which amounted to stealing time and money from the Respondent.

The judge found that in contrast to Marangoni, Kelly's support for the Union was relatively low key and unknown to the Respondent. Kelly's participation in protected activities, of which the Respondent was aware, was limited to submitting exception reports and providing a deposition in the DOL's investigation into the Respondent's breaktime policies. The judge accepted the Respondent's reasoning that because the surveillance report established that Marangoni could complete the 809-808 route within the allotted time, Kelly could have done so as well. In reaching this conclusion, the judge also considered evidence that four other drivers had driven the 809-808 route and had not submitted exception reports.[8] Further, the judge described as "inconceivable" that either Marangoni or Kelly would require the same amount of additional time to complete every trip. Finally, the judge concluded that both Marangoni and Kelly had falsely been claiming additional time and concluded that their misconduct was the basis for the Respondent's decision to terminate them.

For the reasons set forth below, we reverse the judge and find that the Respondent unlawfully discharged both drivers, using the surveillance report as a pretext.

III. ANALYSIS

This case turns on the Respondent's motivation. Under *Wright Line*, supra, the General Counsel must show that the discharged employees' protected conduct was a "motivating factor" in the employer's decision. *Wright Line*, 251 NLRB at 1089. As part of his initial showing,

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1993); see also *Manno Electric*, 321 NLRB 278 (1996).

[7] The judge cited, inter alia, the filing and giving of testimony to the DOL about the Respondent's pay and pension practices as well as submitting exception reports as examples of Marangoni's protected activities.

[8] Between July 30, 2001, and January 31, 2002, Thomas Capuano, Sharief Watson, and Chris Nicholson each drove the route once and David Nichols drove it three times.

the General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. *Pro-Spec Painting, Inc*., 339 NLRB No. 115, slip op. at 4 (2003) (citing *National Steel & Shipbuilding Co*., 324 NLRB 1114, 1119 fn. 11 (1997)). See also *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1955) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive . . . .") (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1996) (internal quotations omitted)).

A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminates absent their union activities. This is because where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp*., 340 NLRB No. 56, slip op. at 4 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981)). See also *Sanderson Farms, Inc*., 340 NLRB No. 59, slip op. at 1 (2003).

The evidence shows that the Respondent knew about Marangoni's involvement in union and protected concerted activities, and that the Respondent's asserted reason for discharging both Marangoni and Kelly was a pretext designed to disguise its unlawful motivation.

A. The General Counsel's Burden

Applying the *Wright Line* test, the judge properly found not only that Marangoni was a leading union adherent and workplace activist, but also that the Respondent was fully apprised of the range of his activities. First, Marangoni openly participated in the Union's organizing drive during the 2000 campaign. Second, his role as steward following the Union's 2001 certification and his serving as the employee representative at the bargaining table gave him particular visibility.[9] Also coincident with his union activities, Marangoni took the lead in raising concerns with the Respondent and the Department of Labor regarding the Respondent's compensation and pension practices and provided depositions during the Government's investigations into those matters.

The judge and our dissenting colleague err however, in finding that the evidence failed to show that the Respondent harbored animus against Marangoni with respect to those activities. Marangoni's phone call to the Respondent's pension fund administrator, Diane Rood, initiated a concerted challenge to the Respondent's pension contribution delinquencies. Marangoni was identified by Balazs as the cause of the ensuing DOL pension scrutiny. Marangoni's followup effort to get information about his pension account ended with Rood abruptly hanging up on Marangoni without supplying him with the requested information. The lingering negative association between Marangoni and the pension matter was highlighted by Balazs' reference to "frivolous lawsuits . . . like the one filed by Larry" as placing the Respondent's business at risk. While the judge dismissed the import of that accusation because it was made during negotiations, we find it significant for that very reason.[10]

That the Respondent was engaged in bargaining at all was attributable in large part to Marangoni's union activities, as a member of the employee organizing committee, and the Respondent knew this. Moreover, as negotiations became protracted, with the unresolved pension issue a contributing factor, Balazs' statement provides insight into the Respondent's hostility toward Marangoni and his protected conduct. In short, the Respondent's displeasure was manifested both in the abrupt termination of Marangoni's telephone call and, months later, in charging him with responsibility for a government investigation that the Respondent declared could seriously adversely affect its business. Accordingly, we

[9] Respondent's view of Marangoni's ties to the Union is revealed in Packo's testifying that "he is the man" when it comes to the Union and Balazs' calling Marangoni "your guy" when speaking to union staff representative Dimondstein.

[10] Our dissenting colleague premises his position on an erroneous reading of the judge's findings on this point. Contrary to the dissent's assertion, the judge neither discredited Joseph Radovich, nor concluded that Balazs did not make the statement concerning frivolous lawsuits. Instead, the judge merely compared Radovich's testimony concerning Balazs' comment with Marangoni's version and observed that the two accounts did not precisely match. Without specifically crediting or discrediting either version of Balazs' statement, he concluded only that he was "unwilling to elevate it to exhibiting union animus." Thus, the judge implicitly found that the comment and gesture were made, but does not infer that they are evidence of animus. By contrast, the judge specifically discredited Marangoni's testimony concerning an alleged exchange with Packo that was not corroborated by Radovich and Diamondstein and explicitly concluded hat Packo did not make the statement.

Moreover, the dissent is mistaken in characterizing Balazs' statement as the sole evidence of the Respondent's animus toward Marangoni's protected activities. As the discussion above points out, Pension Administrator Diane Rood displayed obvious displeasure with Marangoni's unwelcome inquiries concerning the Respondent's pension contributions. Animus was manifested when Diane Rood abruptly hung up on Marangoni in a followup call concerning the pension matter.

find that the record amply demonstrates that the General Counsel has sustained his initial *Wright Line* burden of showing that Marangoni's involvement in union and protected concerted activities was a motivating factor in the Respondent's decision to terminate him.[11]

B. The Respondent's Defense

We also disagree with the judge's finding and our dissenting colleague's position that the Respondent met its *Wright Line* burden of showing that Marangoni would have been discharged for legitimate business reasons even if he had not engaged in union or protected activity. In essence, the judge found merit in Packo's assertion that Marangoni had been routinely falsifying the employer's timecards and Department of Transportation logs and had been stealing time and money from the Respondent when submitting exception time reports. The judge's finding rests largely on his determination that the surveillance report conclusively established that Marangoni was able to complete the trip within the 11 hours allotted by the Respondent. For the reasons described below, we find that the surveillance report was used as a pretext to justify the removal of Marangoni, the leading union and workplace activist, and that Kelly was discharged to disguise the pretextual nature of the Respondent's action.

Both the judge and the dissent err by characterizing the surveillance report as having "conclusively established" that Marangoni completed the route in 11 hours. What the judge and our colleague fail to acknowledge is that the report fundamentally fails to reflect accurately either the beginning or the end of Marangoni's workday. This failure undermines the report's validity and renders it totally unreliable as a basis for determining the total number of hours he worked. The surveillance report did not fully report Marangoni's onduty time while he was at the Rochester facility; specifically, it did not include Marangoni's onduty time at either the start or the end of his assignment. The absence of this information leaves unresolved the question of exactly how long Marangoni was on duty that day.[12] The Respondent made no effort to establish this necessary information but nevertheless used the report as the sole basis to support a broad conclusion that both Marangoni and Kelly had engaged in persistent theft of time during a protracted period. The evidence in this case—which shows that the Respondent ignored aspects of what it knew and miscalculated what it did not bother to investigate—underscores our conclusion that it used the surveillance report merely as pretext. Because he mistakenly views the surveillance report as conclusive, our dissenting colleague accords no significance to the Respondent's failure to seek an explanation from Marangoni, which, as explained below, is strong evidence that the report was simply a pretext for discharging a disfavored union adherent.

The evidence that was available to the Respondent shows that Marangoni's timesheet was consistent with the Respondent's formal schedule (8:45 p.m. to 3:10 a.m. for the trip) in the most significant respects. His stated 8:45 p.m. arrival time at the Pittsburgh BMF comports both with the schedule and with the surveillance report's observation that he arrived at 8:47 p.m. Further, his timesheet reflects that he ended his shift at 3 a.m., again within the timeframe established by the formal schedule. Marangoni testified that after he had arrived back at the Rochester facility just before 2 a.m.,[13] he cleaned his truck and washed the windows, and waited until his assigned drop time.[14] Because other trailers belonging to the Respondent were blocking the door, he could not move his trailer into place until they were removed. At

[11] See *Jack in the Box Distribution Center Systems*, 339 NLRB No. 5, slip op. at 13 (2003) (listing factors that constitute either direct or circumstantial evidence of unlawful motive).

[12] Other than the implied ending time and references to the speed at which he was traveling, Marangoni does not dispute the content of the surveillance report and testified that it is essentially accurate.

[13] As the surveillance report indicates, Marangoni actually left Pittsburgh at 9:25 p.m.—35 minutes ahead of schedule, which accounts for his reported early arrival in Rochester. The record indicates that drivers are permitted to depart earlier than the scheduled time when a trailer is loaded for hauling earlier than scheduled.

[14] Despite Marangoni's early arrival back at the Rochester facility, he testified that he was unable simply to pull into a docking area and drop his trailer because, in contrast to early departure times, drivers had been instructed not to arrive at the mail facilities more than 15 minutes early. This was designed to ensure that an early arriving trailer would not be taking up the docking space that another, regularly scheduled driver expected to have available. Marangoni testified that he understood he was not permitted to drop his trailer before 2:30 a.m.

Although Packo testified that the early arrival proscription had been rescinded following the events of September 11, 2001, the Respondent admits that it had never promulgated this revised instruction in any documented fashion, e.g., in written form or at a meeting with drivers. Marangoni testified he had not been informed of any change in the rule and was unaware that it was no longer in force. We conclude that while the Respondent may have informally apprised some drivers that the policy had been modified, Marangoni was not among them. However, whether Marangoni was justified in waiting until 2:30 a.m. to drop his trailer is irrelevant to whether he had engaged in theft of time.

Thus, the dissent's assertion that Marangoni's shift ended at 2 a.m. is incorrect. While the early departure from Pittsburgh allowed him to arrive in Rochester about an hour earlier than usual, Marangoni understood that he was not permitted to drop his load so far in advance of his scheduled arrival time. Moreover, the dissent's dismissive description of his activities after arriving in Rochester as "make-work" is unfounded. The performance of light maintenance of their vehicles was a regular and required aspect of the drivers' job responsibilities, and Marangoni's movement of trailers at the Rochester facility after 2 a.m. was at the direction of postal officials. Whether Marangoni was required to perform this work is irrelevant to the question of "theft of time"; the surveillance report was incomplete.

the expediter's request, he first moved those trailers.[15] He testified that he did not leave the facility until 3:16 a.m. Because the surveillance report contains no reference to the time Marangoni completed his workday, it does not contradict either Marangoni's timesheet or his claim that he worked 11 and one-half hours, as asserted in his exception report.

In finding that the "theft of time" allegation was a pretext to discharge Marangoni, we are mindful that there are discrepancies apparent between the Respondent's schedule for this route, Marangoni's timesheet, and the observations in the surveillance report. However, these discrepancies were not themselves the basis for the discharge, and they do not show that Marangoni had engaged in "theft of time," as claimed by the Respondent. On the contrary, the evidence supports Marangoni's claim for exception time. Although Marangoni's timesheet reported that he began and ended his assignment at the times provided by the Respondent's schedule, his claim for exception time is essentially consistent with the timesheet report stating that he took 25 minutes less of off-duty breaktime than the schedule allowed.[16] Furthermore, the theft-of-time allegations are directly undermined by the Respondent's knowledge that Marangoni's timesheet reported that he began work at 2:45 p.m., whereas the surveillance report observed him leaving Rochester 15 minutes earlier. Assuming that his pretrip duties took at least 15 minutes, as provided by the Respondent's schedule, then his work report showed that he was not seeking pay for his first 30 minutes of worktime.

Contrary to the Respondent's claims, a comparison of the surveillance report and his timesheet shows no more than a rote reporting of arrival and departure times as set by the Respondent's official schedule, not a theft of time. A fuller recounting of the available evidence, had the Respondent bothered to investigate, shows that Marangoni may well have underreported exception time for his work that day. In addition to the unreported 30 minutes of duty time at the start of the shift, Marangoni's timesheet states that he ended his shift at 3 a.m., which was 16 minutes prior to the time that he testified he ended his duties. The surveillance report does not contradict this testimony, as it failed to report all of Marangoni's workday.

Nonetheless, rather than investigate the apparent discrepancy between the surveillance report and Marangoni's submitted timesheet, the Respondent—and the judge—simply accepted the facially incomplete data and concluded that it proved Marangoni's dishonesty. *Golden State Foods*, 340 NLRB No. 56 (2003) (making that a failure to investigate is "strong evidence of pretext"). The Respondent did not confront Marangoni with the report or seek an explanation as to how he calculated his time. There was no consideration given to the fact that the day on which the route was observed was atypical, in that Marangoni departed Pittsburgh unusually early, and therefore**,** generalizations drawn from that day's surveillance report about how long the route normally took might be unreliable. Instead, the Respondent extrapolated from a document that failed to take account of the full workday in order to justify the discharge of two long-term, well-regarded employees who had clean disciplinary records and drove the same route without incident for several years.[17] Such hasty action is indicative of a discriminatory intent.[18] The Respondent also terminated Kelly, without objective evidence that he might be falsifying his time. We infer that this was done to disguise its unlawful discharge of Marangoni, making Kelly's discharge unlawful as well. See, e.g., *Embassy Vacation Resorts*, supra, slip op. at 3 fn. 13.

Accordingly, we find that the evidence establishes that the Respondent's proffered reasons for terminating employees Marangoni and Kelly were pretextual—that is, they were not in fact relied upon. Rather, the evidence shows that the Respondent terminated Marangoni for engaging in union and other protected concerted activities, and terminated Kelly in order to disguise its unlawful motiviation in discharging Marangoni. Therefore, we find that these discharges violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[15] Although Packo stated that he did not authorize drivers' moving trailers at the mail facilities, both Marangoni and Kelly testified that drivers accommodated the client's occasional—once or twice a month—requests for this type of assistance. Inasmuch as these were normally the Respondent's trailers, the drivers considered it part of their job. Again, whether Marangoni was warranted in complying with these requests is irrelevant to the issue of whether he engaged in theft of time.

[16] Marangoni's timesheet reported a total of 60 minutes of off-duty time, rather than the schedule's provision for 85 minutes of such time. The surveillance report includes essentially consistent observations that Maranconi had taken two 37-minute breaks, in addition to three brief stops at roadside facilities.

[17] Packo testified that both were "very good drivers" and that he had no problems with them prior to the change in the route schedule.

[18] See, e.g., *Embassy Vacation Resorts*, 340 NLRB No. 94, slip op. at 4 (2003) ("An employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the employer's motive was unlawful."); *Golden State Foods*, supra, slip op. at 4; *Hussmann Corp.*, 290 NLRB 1108 fn. 2 (1988).

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating Larry Marangoni and Thomas Kelly on February 13, 2002, the Respondent has violated Section 8(a)(3) and (1) of the Act.

4. By the above-described conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, the Respondent will be ordered to cease and desist from engaging in such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees Larry Marangoni and Thomas Kelly, it will be required to offer these employees immediate and full reinstatement to their former positions, without loss of seniority or other benefits, and make them whole for any loss of wages or other benefits they may have suffered as a result of the discrimination practiced against them, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent shall be required to remove from the personnel files of these employees any reference to their unlawful terminations, and advise them in writing that this has been done. In addition, the Respondent shall be required to cease and desist from engaging in unlawful discriminatory conduct and to post an appropriate notice, attached as an "Appendix."

ORDER

The Respondent, Rood Trucking Company, Inc., Mineral Springs, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting American Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, AFL–CIO, or any other union.

(b) Discharging or otherwise discriminating against any employee for engaging in activities protected under the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employees Larry Marangoni and Thomas Kelly full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make employees Larry Marangoni and Thomas Kelly whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Mineral Springs, Ohio, and Rochester, New York, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 13, 2001.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Boards."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 31, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues, I agree with the administrative law judge that the General Counsel failed to establish a prima facie case under *Wright Line*[1] that the Respondent's discharge of Larry Marangoni and Thomas Kelly violated Section 8(a)(3) and (1). I further agree with the judge that, even assuming arguendo that a prima facie violation of Section 8(a)(3) and (1) had been established, the Respondent established its defense under *Wright Line* that it would have discharged the two even absent their union or protected activity.

"Under the test set forth in *Wright Line*, supra, the General Counsel must initially establish union or protected activity, knowledge, animus and adverse action." *Central Plumbing Specialists*, 337 NLRB 973, 974 (2002). In the instant case, the judge found that the critical element of animus was not established and the General Counsel, therefore, failed in his initial burden to show that the discharges were unlawful. My colleagues assert, however, that the judge erred in this regard and that a statement made by the Respondent's attorney, Mary Balazs, during collective-bargaining negotiations establishes that it "harbored animus against Marangoni" because of his leading role in raising concerns with the Department of Labor (DOL) regarding the Respondent's compensation and pension contribution practices.

I disagree. The judge found that the statement attributed to Balazs, in fact, was never made. At a negotiation session on February 12, 2002, the Union's chief negotiator, Mark Dimondstein, accused the Respondent of jeopardizing its postal transport contracts by not settling certain pension issues with DOL. The majority asserts that the Respondent's animus toward Marangoni was exhibited by Balazs' response to this accusation. According to General Counsel witness and union negotiator Joseph Radovich, Balazs allegedly pointed toward Marangoni and stated that it was the Union's "frivolous lawsuits . . . like the one filed by Larry" that were jeopardizing the Respondent's postal contracts. However, the judge discredited Radovich because he was not corroborated by Marangoni. As the judge said, "Marangoni made no mention in his testimony that Balazs singled him out or made any kind of hand gesture toward him." Accordingly, as this discredited statement is the sole evidence of union animus, the judge's finding of no animus must be upheld, and Marangoni's discharge was not unlawfully motivated by his union or other protected activity.

My colleagues say that the judge did not discredit Radovich regarding Balazs' alleged statement. I disagree. The judge said that he was "hard pressed" to find animus based upon Balazs' alleged statement. The judge's comment was immediately preceded by his comments casting doubt on Radovich's testimony concerning the alleged statement. Thus, I conclude that the judge was "hard pressed" because he did not believe that Radovich was credible in this respect. At the very least, the judge was not persuaded that the General Counsel had met his burden of showing credible testimony. Finally, if there be any doubt about the judge's discrediting of Radovich, it is dispelled by the fact that the judge followed his "hard pressed" comment by saying, *in the alternative*, that "even if" Radovich were credited, that would not show that Balazs harbored animus.

I also agree with this alternative rationale. Even if Radovich were credited, the Balazs statement did not show animus toward protected activity. Balazs' statement was made in negotiations, and simply asserted her view that the pending lawsuits, which she considered frivolous, placed postal contracts at risk.

My colleagues also say that the Respondent's animus was exhibited by Pension Administrator Diane Rood's "obvious displeasure" in abruptly terminating a phone call in which Marangoni inquired about his pension contributions. I disagree. The evidence does not indicate exactly why Diane Rood hung up on Marangoni. If it was because of Marangoni's conversational tone, that, of course, would not be evidence of union animus. If it was because of the protected subject-matter of pension contributions, as the majority assumes, I would still not find animus, because the voicing of displeasure in response to protected activity is protected by 8(c).

But even assuming arguendo that a prima facie 8(a)(3) violation had been established, I agree with the judge that the Respondent met its *Wright Line* defense by showing that it would have discharged Marangoni and Kelly in any event for submitting falsified work records which sought wages for time that they did not work. The falsi-

[1] 251 NLRB 1083, 1089 (1980).

fication was shown by a surveillance report submitted by an independent investigation firm. Contrary to the majority, there is nothing to suggest that the surveillance report was used as a pretext to justify the discharges.[2]

In support of their pretext contention, the majority asserts that the surveillance report of Marangoni's Rochester to Pittsburgh round trip on January 29–30, 2002,[3] was inaccurate, and that the Respondent knew it was inaccurate but relied on it anyway to support its claim that both drivers had been stealing time. There is no inaccuracy in the surveillance report. Rather, the majority gives a distorted interpretation of that report to confuse a straightforward set of facts.

The Respondent sets work schedules for its drivers in accordance with the needs of its customer, the US Postal Service. Because of changes imposed by the Postal Service in July 2001, the Respondent promulgated a new work schedule on July 30, 2001, for the Rochester-Pittsburgh round trip route driven by Marangoni and Kelly. The new schedule required drivers to leave Rochester at 2:45 p.m. and return at 3:10 a.m.—a total time of 12 hours and 25 minutes. But 1 hour and 25 minutes of this time was allocated as off-duty *unpaid* breaktime which, when subtracted from the total allocated round trip time of 12 hours and 25 minutes, left 11 hours of *paid* duty time.

This new schedule differed from the old schedule in one respect. Under the old schedule, the Respondent paid the drivers for 20 minutes of breaktime while they waited at the Pittsburgh Postal facility for postal employees to perform their duties in preparation for the return trip to Rochester. Under the new schedule, drivers were no longer paid for this 20 minutes of "down time." In short, the work schedule changed from 11 hours and 20 minutes of paid time to 11 hours of paid time. However, as the judge correctly emphasized "the change in the schedule did not result in a reduction of driving time for the drivers."

After the change in schedule, Marangoni and Kelly claimed that 11 hours was not enough time and they consistently filed "exception reports" seeking, respectively, 30 and 20 minutes of additional paid time. After several months in which the two drivers invariably claimed these 30 and 20-minute blocks of time, while other drivers who drove the exact Rochester-Pittsburgh route never filed exception reports, the Respondent legitimately grew suspicious. It thereupon commissioned a neutral third party to observe Marangoni as he drove his route on January 29–30.

That third party prepared a surveillance report. The surveillance report clearly and unequivocally confirmed the Respondent's suspicions that the additional 20–30 minutes of paid exception time routinely sought by the two drivers was unsupportable. Thus, the report states that Marangoni departed Rochester at 2:28 p.m. on January 29 and returned at 1:56 a.m. on the January 30—a total round trip time of 11 hours and 28 minutes. The report further indicates that Marangoni took 1 hour and 10 minutes of unpaid breaktime rather than the 1 hour and 25 minutes allowed by the work schedule. Subtracting the 1 hour and 10 minutes from the total round trip time, shows exactly what the judge found—that Marangoni completed the trip in 10 hours and 18 minutes. (The judge rounded off the time to 10 hours and 20 minutes).

Notwithstanding that Marangoni finished his run 42 minutes ahead of schedule, and that he was going to be paid for the full 11 hours allocated in the route schedule, Marangoni was not satisfied. He wanted the additional pay that he lost as a result of the July 2001 schedule change. To recoup that pay he submitted a timesheet and exception report claiming 11 hours and 30 minutes of paid time. The majority states that the discrepancy between Marangoni's timesheet and the surveillance report is easily explained—the surveillance "report did not include Marangoni's on duty time at either the start or the end of his assignment." The majority asserts that if the Respondent had taken the time to investigate the discrepancy it would have concluded that Marangoni was not only entitled to the 11 hours and 30 minutes of pay that he claimed, but that he "may well have underreported" his compensable earnings.

I disagree. The unaccounted for time that the majority claims is omitted from the surveillance report includes 15 minutes of pretrip responsibilities and another 15 minutes of posttrip responsibilities. The Respondent did not overlook this time—it is built into the route schedule. By adding these 30 minutes to the 10 hours and 18 minutes of onduty driving time that is reflected in the surveillance report, Marangoni is left with 10 hours and 48 minutes of compensable time, well within the scheduled 11 hours for the route for which he was entitled to be paid.

[2] Although the Respondent did not undertake separate surveillance of Kelly, I agree with the judge that the surveillance report, which conclusively establishes that Marangoni was falsifying his worktime records in driving the Rochester-Pittsburgh route, also establishes that Kelly's worktime records in driving the same route were also false. Accordingly, because, as I show, the discharge of Marangoni was lawful, so too was Kelly's discharge. In addition, inasmuch as the General Counsel alleges only that the discharge of Kelly was a pretext to mask the "unlawful" discharge of Marangoni, and inasmuch as the latter discharge was lawful, I find that the Kelly discharge was lawful as well.

[3] All dates are in 2002, unless otherwise indicated.

Also omitted from the surveillance report, according to the majority, is compensable time from 2 to 3 a.m. when, according to Marangoni's testimony at trial, he performed a number of duties such as cleaning his truck, washing its windows, and moving trailers around the yard at the request of the Postal Service. However, the work that Marangoni performed between 2 and 3 a.m. was not compensable. It was "make-work." His shift ended at 2 a.m. when, according to the surveillance report (1:56 a.m.) and Marangoni himself (2 a.m.), he arrived back at the Rochester facility. Even allowing for 15 minutes of posttrip wrap-up duties, Marangoni could not properly have requested pay beyond 2:15 a.m. The majority, however, relying on Marangoni's testimony, asserts that Marangoni was forced to stay until 3 a.m. because he had to wait "until his assigned drop time [and] because other trailers belonging to Respondent were blocking the door" at the Rochester trailer dock. However, this was Marangoni's fault. The traffic that he encountered inside the Rochester facility was a result of his arrival there before the officially scheduled time, and the reason why he arrived too early was because, according to his calculations, he declined to take 25 minutes of off-duty *noncompensable* time during the course of his round trip—time which he was determined to recoup as *compensable* time between 2 and 3 a.m.

The judge rejected these contentions. The majority seeks to revive them. The judge fully considered Marangoni's testimonial explanation of the discrepancy between his timesheets and the surveillance report, and the judge rejected Marangoni's testimony. Had the Respondent conducted the investigation that the majority contends should have been undertaken by the Respondent, it simply would have learned what Marangoni testified to and which the judge rejected.

In sum, reiterating what the judge emphasized, "the change in the schedule did not result in a reduction of driving time for the drivers." Rather, it resulted only in the elimination of 20 minutes of paid downtime that drivers had received before July 2001 as they waited around the Pittsburgh mail facility for postal workers to reload Respondent's trailers for the trip back to Rochester. As the judge correctly found, "the surveillance report conclusively established that Marangoni was able to complete the trip within the eleven hours allotted in the schedule" and that by consistently submitting exception reports over a period of months claiming an additional 20–30 minutes of paid time, both he and Kelly "were attempting to recoup the reduced pay that resulted when the schedule changed on July 30, 2001." They were both properly discharged for these repeated offenses and the complaint was properly dismissed by the judge.

Dated, Washington, D.C. August 31, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting American Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, AFL–CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in lawful protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Larry Marangoni and Thomas Kelly full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Larry Marangoni and Thomas Kelly whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Larry Marnagoni and Thomas Kelly, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ROOD TRUCKING COMPANY, INC.

Lillian Kleingardner, Esq. and *Beth Mattimore, Esq.*, for the General Counsel.

Corinne Katz Moore, of Cleveland, Ohio, for the Respondent-Employer.

Daniel B.Smith, Esq., of Washington, DC, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on July 9, 10, and 11, 2002,[1] in Buffalo, New York, pursuant to a complaint and notice of hearing (the complaint) issued by the Regional Director for Region 3 of the National Labor Relations Board (the Board) on April 30. The complaint, based upon an original charge filed by American Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, AFL–CIO (the Charging Party or the Union), alleges that Rood Trucking Company, Inc. (the Respondent or the Employer), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent discharged employees Larry Marangoni and Thomas Kelly on February 13, because they assisted the Union and engaged in protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in the trucking industry as a contract carrier for the United States Postal Service, and has an office and place of business located in Mineral Springs, Ohio. Respondent, in conducting its business operations, performs services valued in excess of $50,000 directly to entities located outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2002 unless otherwise indicated.

II. ALLEGED UNFAIR LABOR PRACTICES B

A. Background

Respondent has been in business for approximately 40 years. Its only customer is the United States Postal Service for whom it hauls mail to its various facilities located in the States of New York, Pennsylvania, and Ohio. It employs approximately 140 drivers for this purpose.

In 1999, the Union filed a representation petition with the Board to seek an election at Respondent to represent the truckdriver employees. The election was held in December 1999, with the Union losing the vote.

The Union commenced a second organizing drive at the Respondent during the summer and fall of 2000 and a second election was held in December 2000. The Union won the election and in February 2001, was certified by the Board as the exclusive collective-bargaining representative of the truckdrivers. Marangoni was actively involved in this second election campaign and openly wore union shirts and insignia at driver meetings held by Respondent managerial representatives. After the election, Marangoni was elected steward for the Rochester, Syracuse, and Utica drivers and served on the Union's negotiation committee that met with the Respondent for approximately 12–13 sessions between March 2001 and February 2002. To date, the parties have not finalized an initial collective-bargaining agreement. While Kelly supported the Union and signed an authorization card, he was not a member of the Union and acknowledged that the Respondent would have no reason to know that he was a union supporter. The Respondent stipulated that it was aware of Marangoni's active participation and support of the Union.

In April 2001, Marangoni was scheduled to be a witness at a Board unfair labor practice hearing in Pittsburgh on a complaint and notice of hearing issued against the Respondent. He was being called by the General Counsel to testify about an anti-union statement that the president of Respondent allegedly made in his presence. The complaint alleged the discharge of four truckdrivers and numerous independent violations of Section 8(a)(1) of the Act. The parties settled the case with two of the four drivers being reinstated and two drivers paid back pay after waiving reinstatement.[2] As an additional aspect of the settlement relevant herein, the certification year was extended until late April 2002.

In May 2001, Marangoni had a telephone call with Diane Rood, the wife of Respondent's president, and the pension plan administrator for the Employer. Marangoni inquired of Rood why his pension account did not contain contributions from the Employer for the last 7 months. Rood offered to mail the de-

[2] Raymond Kosto testified in the subject proceeding, and was a driver that the Respondent previously terminated who accepted a monetary settlement after waiving reinstatement. While Kosto testified on direct examination that Packo informed him that he was terminated from Respondent because of his union activities, he recanted that testimony in response to questions that I asked him. I informed the General Counsel that I would make no finding regarding Kosto's termination in June 2000, nor would I rely on his testimony to infer animus or unlawful motivation against the Respondent regarding the termination of Marangoni or Kelly.

posit information but after it did not arrive in 3 weeks, Marangoni placed a second telephone call to Rood. He apprised Rood that he had spoken to several drivers who likewise had not received their pension contributions and that these employees intended to follow up on this discrepancy. Rood hung up on Marangoni.

Both Marangoni and Kelly gave depositions in November 2001 in a Department of Labor (DOL) proceeding that involved a dispute over unpaid breaktime and pension contributions at the Respondent.[3] Additionally, Marangoni gave a second deposition in the DOL proceeding in April 2002. The Respondent stipulated that it was aware that both employees gave depositions in these proceedings.

On February 13, both Marangoni and Kelly were terminated for falsifying time cards and Department of Transportation logs and stealing time and money from the Employer.

At all material times, George Rood is the president of Respondent while Patrick Packo holds the position of director of operations. Mark Dimondstein coordinated the organizing campaign for the Union at Respondent and serves as chief negotiator and spokesperson. Joseph Radovich assisted in the organizing campaign at the Respondent and serves as a member of the Union's negotiation team.

B. Facts

The Post Office provides the arrival and departure times that it wants the Respondent to have drivers at its facilities to pick up the mail and it is the Employer's responsibility to make up a trip schedule to accommodate these needs.[4] Marangoni and Kelly were experienced truckdrivers who had been employed at Respondent for approximately 7 years at the time of their terminations. Both Marangoni and Kelly had exemplary driving records and according to Packo were excellent and dependable drivers.

For the last 4–5 years Marangoni and Kelly have alternated driving trip 809–808 from Rochester, New York, to Pittsburgh, Pennsylvania, and return. They drove opposite days, working 2 days on and 2 days off. The Respondent has had a contract with the Postal Service since 1992 to run this route. Between December 6, 1999, and July 29, 2001, the roundtrip was scheduled to be made in 11 hours, 20 minutes (GC Exh. 4). Effective July 30, 2001, due to the Postal Service reducing the arrival time on the contract by 15 minutes it correspondingly reduced the drivers breaktime by the same amount, and the time to complete the roundtrip was now scheduled for 11 hours (R Exh. 2). However, the change in the schedule did not result in a reduction of driving time for the drivers. Rather, there was a greater period of down time at the Pittsburgh bulk mail facility, which resulted in the drivers being paid less when they were on that route. In effect, the hours of Marangoni and Kelly were reduced by 20 minutes, thus, lowering their pay in that amount from what it was prior to the schedule change. Immediately after this change occurred, both Marangoni and Kelly apprised Packo that they could not complete the trip within the 11 hours allotted on the route schedule. Packo instructed both drivers to keep doing the run but put in for exception time.[5] During the first month after the schedule change, Marangoni and Kelly submitted exception reports that reflected different times necessary to complete each trip. Thereafter, for every one of his runs on trip 809–808, Marangoni submitted an exception report that sought 30 minutes while Kelly requested 20 minutes. Both Marangoni and Kelly, on all occasions, were paid for the extra time that they submitted on their exception reports.

After Marangoni and Kelly continued to submit exception reports for each trip between Rochester and Pittsburgh, Packo began to see a pattern and was concerned that this was a method devised to get back the 20 minutes that was reduced in the July 30, 2001 route schedule change. Packo intended to drive the route himself but because of pressing business was not able to do so. In October 2001, the Employer started to gear up for the Christmas mail delivery that doubled the amount of mail carried and necessitated additional trips to be run on a number of routes. Packo, along with one other management representative, was solely responsible for hiring additional temporary drivers and coordinating the additional trips and routes that had to be scheduled. Additionally, the parties held negotiation session's 2 days each week during January 2002 that usurped Packo's time. Therefore, it was not until sometime in late January 2002, that Packo turned his attention to the problem of Marangoni and Kelly submitting exception reports for each trip taken on their route. Packo consulted with Respondent's president and Attorney Mary Balazs, labor counsel and chief negotiator, who recommended that an independent third party be retained to investigate so that an objective and unbiased report would be rendered. All of these individuals recognized that Marangoni was an active union supporter and did not want to be accused of a tainted investigation. For this purpose, Packo entered into a contract with Corporate Investigative Service to conduct surveillance on January 29 and 30 of Marangoni while he drove his route from Rochester to Pittsburgh and return. Packo apprised the investigative service that Marangoni may be involved in a theft of time on his route that resulted in stealing money from the Employer. The investigative service followed Marangoni on his route, took videotape of him along the trip, and filed an hourly report of the surveillance (GC Exh 6). The written report and the videotape were provided to Packo on or about January 31. The report conclusively showed that Marangoni was able to complete the route within the 11 hours allotted on the schedule and he even completed

[3] A total of 8–10 drivers either testified by direct testimony or gave depositions.

[4] A route schedule is developed for each run. It has been developed through actual experience in operating the runs, with considerations given for efficiency, safety, posted speed limits, roadway types, and anticipated traffic delays. The route schedules specify reporting in, departure, arrival, and reporting out times, together with times for meal breaks. Drivers are expected to adhere to such times specified in the route schedules.

[5] An exception report is an Employer form that is completed if a driver is unable to complete a trip, including pretrip and posttrip duties, within the total time specified on the route schedule. Examples used to complete such a report are traffic accidents, inclement weather, traffic congestion, or other legitimate reasons that preclude the driver from completing the trip in the allotted scheduled time period.

this observed trip in approximately 10 hours.[6] Packo did not take any immediate action, as he needed to review the time reports and Department of Transportation logs including any exception report filed by Marangoni for these specific days. The parties held negotiation sessions on February 11 and 12. It was after the February 12 session that Marangoni personally gave Packo his timecards and Department of Transportation logs together with an exception report for the 2-week pay period that included January 29 and 30 (GC Exhs. 7, 8, and 9). After reviewing the surveillance report and comparing it with Marangoni's timecards and Department of Transportation logs, it became apparent to Packo that Marangoni did not need the extra time being claimed in the exception report to complete the route. Accordingly, after consulting with President Rood and Balazs, it was decided to terminate Marangoni and Kelly.[7] On February 13, Packo telephoned both Marangoni and Kelly at home and apprised them they were being terminated immediately for falsifying timecards and Department of Transportation logs and taking time and money from the Employer.

C. The 8(a)(1) and (3) Allegations

1. Larry Marangoni

The General Counsel alleges in paragraphs 6 and 7 of the complaint that Marangoni was terminated because of his activities in assisting the Union and for engaging in protected concerted activities.

Respondent argues that the employment action it took was for legitimate business reasons. It specifically notes that its standards of conduct provide for discipline up to and including termination for falsification of logs and records and the action in this case was consistent with the termination of another employee for the same reason.[8]

The protected nature of Marangoni's and other employee's efforts to protest Respondent's actions concerning unpaid breaktime and pension contributions has long been recognized by the Board who has held that similar conduct comes within the guarantees of Section 7 of the Act. See *Joseph De Rairo, DMD, P.A.*, 283 NLRB 592 (1987). The Board has also held in *Mike Yurosek & Sons, Inc.*, 306 NLRB 1037, 1038 (1992), that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [sic] logical outgrowth of the concerns expressed by the group." In this case, I find that Marangoni's complaints, on his own and the employees' behalf about the lack of unpaid breaktime, the submission of exception reports requesting additional compensation, and the insufficiency of pension contributions in employee accounts fall within the ambit of protected concerted activity. However, it must be determined whether Marangoni was disciplined and thereafter terminated based on such activity.

In *Wright Line*, 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1993). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

With respect to Marangoni, there is no dispute that he participated in and gave depositions in DOL proceedings regarding unpaid breaktime, submitted exception reports requesting additional compensation, and raised the issue of Respondent's pension contributions with a responsible official.[9] The General Counsel also lists a number of incidents to support the argument that Marangoni's termination was unlawful. First, the General Counsel relies on a statement that President Rood allegedly made to Marangoni in May 1999, after a driver meeting, that "we will get rid of all the people who started the union."[10] Second, the General Counsel argues as further evidence of unlawful motivation, that after Marangoni made a statement at the February 12 negotiation session that "George Rood was stealing his money," Packo replied, "If it wasn't for you this would not have happened." I reject this aspect of the General Counsel's argument for the following reasons. Packo in a forthright and credible manner denied that he ever made such a statement at the negotiation session. However, more

[6] The report confirmed that Marangoni did not drive the route in accordance with the schedule provided by Respondent. Additionally, it showed that Marangoni completed the route in 10 hours and 20 minutes, yet he claimed routinely on his timecards after July 31, that it took him 11 hours and thirty minutes.

[7] Although individual surveillance was not undertaken for Kelly, it was determined that if Marangoni did not need extra time to complete the Rochester to Pittsburgh route, then the same presumption held for Kelly.

[8] Employee Norman J. Farland was discharged on April 19, 1999, for falsifying logs (R Exh 7). I also note that the Respondent previously terminated a mechanic and a secretary who had stolen from the Employer.

[9] None of the other drivers that testified or gave depositions in the DOL matter were visited with discipline. Likewise, none of the other employee union negotiators were disciplined because of their participation in collective-bargaining negotiations with the Respondent.

[10] I have a number of concerns regarding this statement and attributing unlawful animus or motivation to the Respondent. First, Marangoni testified that during the first union campaign in 1999, he was not an active union supporter and voted against the Union in the election. Second, even if the statement was made by Rood in 1999, it is remote in time to the events in February 2002. Third, between 1999 and February 13, when Marangoni was terminated there is no evidence of any unlawful conduct or discipline directed at Marangoni. Lastly, Marangoni's testimony that the Rood statement occurred in 1999 is directly contrary to his sworn statement given to the Board in April 2002 that the remarks were made by Rood in August 2001 (R Exh 3).

compelling is that Union Representatives Radovich and Dimondstein, who both attended the February 12 negotiation session, did not corroborate Marangoni's testimony about Packo's alleged statement. The General Counsel further asserts that a statement made during a negotiation session the day before Marangoni and Kelly were terminated also shows animus. In this regard, Radovich testified about a comment that Attorney Balazs made in response to a statement by Dimondstein. According to Radovich, Dimondstein said to Balazs that he could not believe the company was putting the postal contracts at risk by not settling the pension issue. Balazs responded, "that the only thing that is putting these contracts at risk are the frivolous lawsuits being filed by the Union, and that she stated like the one filed by Larry and gestured toward Marangoni with her hand." According to Radovich, Dimondstein denied that the charges were filed by the Union and informed Balazs that the drivers filed the charges. Balazs said, "No, it's the Union." I note that Marangoni's testimony regarding this conversation did not corroborate Radovich's version. He testified that the conversation took place in January 2002, and that Balazs said something about frivolous charges that "we" were filing. Marangoni made no mention in his testimony that Balazs singled him out or made any kind of hand gesture toward him. Thus, I am hard pressed to impart animus toward the Respondent regarding this conversation. I further note that the negotiation process often engenders heated exchanges between participants and even if Balazs gestured or referred to Marangoni during this process, I am unwilling to elevate it to exhibiting union animus or attribute it to the basis for his termination. Lastly, the General Counsel relies on a statement by Balazs in a private conversation with Dimondstein the day before the terminations took place. In regard to this conversation, it occurred at a breakfast meeting between Balazs and Dimondstein away from the bargaining table in an effort to resolve the pension issue. Dimondstein testified that he told Balazs that the DOL issue began before the Union was certified and that the Union was not directly involved. Balazs said, "that the Union was involved, that it was 'your guy' Marangoni that was responsible for the proceeding." Even if Balazs made the statement I do not attribute that it was based on union animus, as it represents Balazs belief in response to Dimondstein's statement that the Union was not directly involved. Balazs, at the time she made the statement, was aware that Marangoni gave a deposition in the DOL matter in November 2001, and had raised the pension issue in a telephone conversation with Diane Rood in May 2001. Likewise, the statement took place after the surveillance was conducted but before Marangoni turned in his timecards and the Respondent had an opportunity to compare them.

Respondent, to buttress there argument that trip 809–808 could be run within the 11 hours allotted in the schedule, submitted evidence that four other drivers (David Nichols, Thomas Capuano, Chris Nicholson, and Sharief Watson) were each able to complete it without incident and did not submit an exception report. These drivers ran the route during the period when Marangoni and Kelly were still employed.[11] Indeed, Nichols drove the route on three occasions in January 2002 when Marangoni participated in negotiation sessions, and did not submit any exception time reports while completing the run in the scheduled time.

Based on the forgoing, I am not convinced that Marangoni's termination was based on either his protected concerted activities of filing and giving testimony to DOL, his filing of exception reports, or for his active pursuit of union activities. If others disagree and conclude that the General Counsel has made a strong showing that antiunion sentiment was a substantial or motivating factor in the termination of Marangoni, I find that Respondent has met its burden that the same action would have taken place even in the absence of his protected conduct. In this regard, Packo was confronted over a period of several months with timecards, Department of Transportation logs and exception time reports that were submitted by Marangoni for 30 extra minutes to complete the Rochester to Pittsburgh run. Packo believed that this was excessive and determined to have a third party undertake an investigation to determine whether his instincts were correct. Indeed, Respondent made a concerted effort to have a neutral perform the surveillance as it was common knowledge that Marangoni was a union supporter and if the report proved adverse it was anticipated that an argument would be raised, as in the subject case, that it was related to his union activities. Packo's final decision to terminate, in consultation with higher-level management representatives, was only made after he compared the surveillance report and the videotape to the timecards and logs submitted by Marangoni that covered the identical days for which he sought reimbursement for extra time to complete the route. The surveillance report conclusively established that Marangoni was able to complete the trip within the 11 hours allotted in the schedule. Thus, Packo concluded that Marangoni had been routinely falsifying the Employer's timecards, Department of Transportation logs and when submitting exception time reports had been stealing time and money from the Respondent.

In summary, I am not convinced that the Respondent cast about until February 13 to terminate Marangoni for his active pursuit of union or protected concerted activities. If the Respondent wanted to terminate him for this reason, it stands to reason that they would have done so during the organizing campaign in October and November 2000, when Marangoni by his own admission revealed that he was the leading union organizer. Likewise, the Respondent knew in February 2001, that Marangoni was elected as a union steward and was appointed to serve on the Union's negotiation team. In my opinion, it strains credulity that the Respondent having learned about Marangoni's union activities over a year earlier would have waited to terminate a productive driver who had no infractions on his

[11] Both Respondent and the General Counsel attempted to call witnesses who intended to testify about their experiences in driving route 809–808 after the terminations on February 13. I denied permission for those witnesses to testify, as their testimony would not be similarly situated to the discriminatees, who drove the route prior to February 13. Further, I precluded these witnesses from testifying because I presumed that these drivers knew that there predecessors were terminated for falsifying records and submitting excessive exception time reports, and would make every effort to complete the trip within the allotted time frame. Under these circumstances, I permitted the Respondent and the General Counsel to make an offer of proof.

record until February 13. Therefore, in agreement with the Respondent, I find that Marangoni was terminated for legitimate business reasons unrelated to any protected concerted or union activities. Accordingly, I recommend that paragraphs 6 and 7 of the complaint relating to Marangoni be dismissed, and find that Respondent did not violate Section 8(a)(1) and (3) of the Act.

2. Thomas Kelly

The General Counsel alleges in paragraphs 6 and 7 of the complaint that Kelly was terminated on February 13, because he assisted the Union and engaged in protected concerted activities. The General Counsel acknowledges that Kelly does not have extensive union activity. While he supported the Union and signed an authorization card, he was not a member of the Union nor did he hold a union office, or serve on the negotiating committee. Kelly acknowledged that respondent representatives would have no reason to know that he was a union supporter or active in the Union. Indeed, Packo credibly testified that he had no knowledge that Kelly was an active supporter or was involved in union activities.

In response to my request to state the theory of the General Counsel's case, counsel asserts that Kelly engaged in protected concerted activities by submitting exception time reports claiming additional paid time, and testified by deposition in a DOL proceeding involving unpaid breaktime and pension contributions. Since both Marangoni and Kelly drove the same Rochester to Pittsburgh route and it is undisputed that Marangoni had extensive union activity, it was necessary for the Respondent to terminate both individuals for falsifying records and stealing time and money from the Respondent.[12]

While the Respondent admitted that an independent surveillance investigation was not undertaken for Kelly, it reasoned that if Marangoni was able to complete the trip within the allotted time period provided for in the schedule, Kelly likewise could have completed the run within 11 hours. Kelly, like Marangoni, on each trip completed routinely submitted timecards and Department of Transportation logs verifying that the Rochester to Pittsburgh trip took longer then 11 hours to complete and submitted exception time reports claiming reimbursement for the extra 20 minutes it took to complete the route. Even if Respondent did not independently investigate Kelly, like it did for Marangoni, there is no evidence that the termination was effectuated because of Kelly's protected concerted activities or activities on behalf of the Union. In this case, Kelly's association with Marangoni because they drove the same route, does not shield him from submitting false exception time reports and claiming money for time he was not entitled to in completing the route.[13] It is inconceivable that for an extended period of time, Kelly or Marangoni would need the same additional time, every trip, to run the route. Rather, I conclude that both individuals were attempting to recoup the reduced pay that resulted when the schedule changed on July 30, 2001.

For all of the above reasons, and particularly relying on the independent investigation conducted by Respondent in verifying the length of time it takes to drive the Rochester to Pittsburgh route, I find that Kelly was terminated for legitimate business reasons. Accordingly, I recommend that paragraphs 6 and 7 of the complaint be dismissed as it relates to Kelly and find that Respondent did not violate Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 1, 2002

[12] The General Counsel also argued that as additional motivation for the discharge, the Respondent required Kelly to be drug tested the day before his termination. I reject this argument as the evidence introduced at the hearing established that the safety officer, who had no knowledge of the surveillance report, randomly selected drivers for drug tests and Kelly's test just happened to take place on February 12. I find no evidence that the random drug test was in any way connected to Kelly's protected concerted activities or to any activities on behalf of the Union.

[13] The General Counsel argued that on occasions when Marangoni and Kelly moved trailers for the Postal Service, the extra time in the exception time reports represented reimbursement for this service and was used, in part, as a pretext for termination. I reject this argument as both Marangoni and Kelly testified that moving trailers only occurred on an infrequent basis. Moreover, Packo credibly testified that moving trailers was not part of Respondent's contact with the Postal Service and if the Employer was not getting paid, it legitimately could not pay its drivers for work not within their job description. He also testified that if he knew Marangoni or Kelly were moving trailers, he would have instructed them not to do it unless they were paid.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.